



Some Legal and Insurance questions arising from the Missing MH370

- A Malaysian Law perspective

The recent incident of Malaysian airline flight MH370 is a tragic calamity which has left a gasping void in the hearts and minds of the people especially families who lost their loved ones. The uncertainty of the calamity, and the mystery clouding the actual event has further added to rife speculation and many theories about its mysterious disappearance. Although, the calamity cannot be undone, and no amount of compensation can fill that void left behind, the families of the deceased would generally be entitled to claim compensation.

The applicable law in Malaysia

Carriage by Air Act 1974 (ACT 148) and Orders which incorporate the Montreal Convention of 1999 and its subsequent amendments.

Who can you claim against?

There are possibly two parties that a claim can be made against. One being the airlines and the other the manufacturer of the aircraft.

Who are the possible claimants?

The persons eligible to make the claim against the airlines and/or the manufacturer of the aircraft would be the family member or next of kin of the deceased passenger.

Where can you make the claim?

There are multiple jurisdictions where the claims can be made. Purely for convenience or to avail benefit from local regulations, if the tickets to the journey were purchased outside Malaysia (e.g. China or USA), then a claim can be made in that country. If the tickets were purchased in Malaysia then a claim can be made in Malaysia. But in all cases, claims can be made in Malaysia irrespective of where the tickets were purchased, since the airline has its principal place of business in Malaysia and the journey commenced from Malaysia. Claims can also be made in the final place of agreed destination of the aircraft or the place of permanent residence of the passenger.

Alternatively, a claim can be made against the aircraft manufacturers for any possible manufacturing defect in Chicago, USA. Although the cause of the calamity is yet to be ascertained, and it can only be ascertained if and after the wreckage of the aircraft is recovered. Once the wreckage is recovered and upon investigation, should the evidence point towards aircraft manufacturer, then liability of the manufacturer would be potentially sustainable.

What is the likely amount of compensation?

Malaysia is a signatory to the Montreal convention of 1999. Under this convention, the airline will be liable to for a sum up to US\$ 175,000 (RM 576,000) per passenger i.e. (131,100 SDR) as per the convention. This amount may go much further should the airline fail to prove that they were not negligent, or it resulted from a wrongful act or omission of the carrier or its servants or agents. However, it is usually not the trend of Malaysian courts to award massive awards in damages in the millions. Compensation would be awarded in accordance with applicable laws and principles. Some claimants may also want to look for other possible avenues to bring the claim where the amount of compensation is higher due to local regulations. For instance, in the US, where the compensation amount is likely to be much more. However, it must be noted that US or China court judgments are not recognised in Malaysia and enforcement against a Malaysian based carrier company may be an obstacle.

Crew Compensation

The compensation amount for the crew members will largely depend on the contractual agreement between the airline and the crew member, and in the event no such agreement had been reached, then it will be governed by the workers' compensation law. Although they may be covered by an insurance facilitated by their employer, it is very unlikely that they crew members will qualify for claims under the Montreal Convention.

Can the carrier escape liability?

The carrier cannot escape liability or contest claims for a sum up to US\$ 175,000 (RM 576,000) per passenger i.e. (131,100 SDR) as per the convention. However, if the families of the deceased are seeking for a sum in excess of the said amount, the carrier will have to prove that they were not negligent, or it resulted from a wrongful act or omission of the carrier or its servants or agents. There will have to further prove that the act was a result external factors beyond their control such as terrorism, bad weather etc.

Time bar

The right to damages will extinguish if an action is not brought within a period of two years. This from the date on which the aircraft ought to have arrived, or from the date on which the carriage stopped. The methodology of computing this period will be deter-

mined by the courts where the claims are brought.

When are the family members likely to receive compensation?

There is no time limit prescribed by which the airline must pay to the claimants. This will largely depend on the court order should the matter be contested by the airline. Given the sentiments and the prevailing circumstances, it is very unlikely that the airline or the insurers will take long to resolve this within the prescribed limitation period. There have been previous instances where the compensation had been paid even before the wreckage or the bodies had been found and also in cases where the bodies were not found. Although legally in Malaysia a missing person can be declared dead after a period of seven years if it is evident that they are not alive. This period can vary in other countries (eg. in China such period is limited to two years). However, in cases such as this, the courts may intervene if necessary to declare the missing passenger dead within weeks or months.

What other insurance claims can be made?

The family member of the casualty may also claim for any insurance that the deceased may have taken cover. e.g. life insurance or additional travel insurance.

What about the airline?

Under the Carriage by Air Act 1974, the State Parties require their carriers to maintain adequate insurance covering their liability as prescribed by the Convention. As long as the carrier can prove that there was no negligence on the part of the airline or its agents, the loss to a large extent will be covered by the insurers.

What about loss to the insurance companies?

Liabilities of this magnitude are unusually re-insured and the risk divided among other insurers so one insurance company does not have to bear the full loss exposure.

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